class is "inappropriate and at odds with policies underlying Title VII"); *Pivirotto v. Innovative Systems, Inc.*, 191 F.3d 344, 354 (3d Cir. 1999) (requiring proof that one was replaced by one of the opposite sex "does not, as a matter of law or logic, foreclose the plaintiff from proving that the employer was motivated by her gender"); *Jackson v. Richards Medical Co.*, 961 F.2d 575, 587, n. 12 (6th Cir. 1992) ("fact that an employer replaces a Title VII plaintiff with a person from within the same protected class as the plaintiff is not, by itself, *sufficient* grounds for dismissing a Title VII claim") (emphasis in original); *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 159 (7th Cir. 1996) ("That one's replacement is of another race, sex, or age may help to raise an inference of discrimination, but it is neither a sufficient nor a necessary condition . . . "); *Walker v. St. Anthony's Medical Center*, 881 F.2d 554, 558 (8th Cir. 1989) ("it is entirely conceivable that a woman discharged and eventually replaced by another woman may be able to establish that she was the object of impermissible discrimination related to her gender"); and *Howard v. Roadway Exp., Inc.*, 726 F.2d 1529, 1534 (11th Cir. 1984) ("proof that the employer replaced the fired minority employee with a non-minority employee is not the only way to create" a jury issue on discrimination).

The correct interpretation of Title VII is demonstrated by the Eighth Circuit decision in *Walker v. St. Anthony's Medical Center, supra*, at 558:

> We agree with Walker that the district court placed inordinate reliance upon its finding that she was replaced by a female. Although the elements of a prima facie case as delineated in

> *LeGrand*[4] lend support to the district court's belief that Walker was required to show that she was replaced by an individual from outside the protected class in question, . . . no such per se requirement has traditionally been imposed in cases brought under Title VII. Rather, Title VII has been interpreted t require only that, in addition to the first three elements of a prima facie case, the plaintiff demonstrate that his or her discharge occurred in "circumstances which allow the court to infer unlawful discrimination." *Craik v. Minnesota State Univ. Bd.*, 731 F.2d 465, 469 (8th Cir.1984);

Walker v. St. Anthony's Medical Center, supra, 881 F.2d at 558 (footnote omitted).

The fact that the Fifth Circuit has given an overly restrictive, mechanical interpretation of Title VII is also demonstrated by precedents of this Court. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), upon which the Fifth Circuit purported to rely, contains no requirement that an employer hire a person of the opposite race. *O'Conner v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996), noted that "[t]he fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age.*" (emphasis in original); *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) held that "[t]he *prima facie* case method established in *McDonnell Douglas* was 'never intended to be rigid, mechanized, or ritualistic.'"; *Patterson v. McLean Credit*

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[4] *Legrand v. Trustees of University of Arkansas*, 821 F.2d 478 (8th Cir. 1987). (Note, Legrand was incorrectly cited by the Eighth Circuit Court of Appeals as LeGrand).

Union, 491 U.S. 164, 217-218 (1989) noted that there are "innumerable different ways in which a plaintiff seeking to prove intentional discrimination by means of indirect evidence can show that employer's stated reason is pretextual and not its real reason, and plaintiff need not be forced to pursue any one of these in particular."

The Fifth Circuit held that if plaintiff could not demonstrate replacement by a person of a different race, his only other method of obtaining a jury determination was to show "a similarly situated employee under '*nearly identical*' circumstances was treated differently." App. 14. Petitioners and black employee Byrd were charged with the same offense – removal of company assets.

However, according to the Fifth Circuit, the value of the company asset which the black employee had removed from company property was "dramatically less" than the value of the tire-changing machine, which Petitioners lent. App. 14. Thus, the circumstances were not "*nearly identical*." App. 13.

Contrary to the Fifth Circuit, other circuits do not require the circumstances to be "*nearly identical*," before a jury can consider whether there was discriminatory intent. Instead, according to other circuits, a fact issue is presented to the jury if plaintiff has demonstrated the black and white employees are accused of the same offense. See *Ward v. Procter & Gamble Paper Products, Inc.*, 111 F.3d 558, 560-61 (8th Cir. 1997) (plaintiff must demonstrate employees of opposite races "are involved in or accused of same offenses and are disciplined in different ways"); *Kendrick v. Penske Transportation Services, Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000) (employee presents factual issue when he demonstrates that "he was treated differently

from other similarly-situated employees who violated work rules of comparable seriousness"); *Little v. Illinois Department of Revenue*, 369 F.3d 1007, 1012 (7th Cir. 2004) (employee must show, "among other things that he was treated differently than a similarly-situated employee who was not in a protected class"); *McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273, 283-84 (1976) (Title VII requires that an employer not discriminate between black and white employees when both were guilty of theft).

Also, making either replacement by one of the opposite race or proof that plaintiff was in nearly identical circumstances to a favored non-white employee, detracts from the jury's authority to consider whether to infer discrimination from all relevant circumstances. For example, a jury could infer that, because an administrative judge found Petitioners had not been guilty of any misconduct, 3:935, a discriminatory reason is the more likely explanation for their firing. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) held:

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt."

530 U.S. at 147, quoting *Wright v. West*, 505 U.S. 277, 296 (1992).

Because there are "myriad factors of human existence which can cause discrimination in a multitude of ways," *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 22 (1971), the Fifth Circuit's holding that either "nearly

identical" circumstances or replacement by a member of the opposite race is always required contravenes this Court's precedents.

II. CONTRARY TO OTHER CIRCUITS, THE FIFTH CIRCUIT REFUSED TO FOLLOW DICTUM BY THE MISSISSIPPI SUPREME COURT WHEN THAT DICTUM WAS THE ONLY AVAILABLE SOURCE OF MISSISSIPPI LAW.

Besides rejecting Petitioners' federal race discrimination claim on the grounds that Plaintiffs did not meet a rigid formula required to present a jury issue, the Fifth Circuit Court of Appeals also upheld the grant of summary judgment on Plaintiffs' state law claim. This state law claim was that Petitioners had been discharged in violation of Mississippi's public policy, since they were fired because they reported what they believed, in good faith, to be illegal activity.

The Fifth Circuit held that proof of reporting of an actual crime was required, and that a good faith effort to protect the employer wrongdoing is not enough to invoke the public policy exception. In so holding, the Fifth Circuit expressly refused to consider what it considered to be dictum from two Mississippi Supreme Court decisions: *Willard v. Paracelsus Healthcare Corp.*, 681 So.2d 539 (Miss. 1996) (*Willard I*) and *Paracelsus Healthcare Corp. v. Willard*, 754 So.2d 437 (Miss. 1999) (*Willard II*).[5] *Williard I* and *Williard II* contain statements contradicting the Fifth Circuit's holding. *Willard II* stated that "neither *McArn*[6]

[5] Both *Willard I* and *Willard II* were unanimous opinions as to this issue.

[6] *McArn v. Allied Bruce-Terminix Co.*, 626 So.2d 603 (Miss. 1993).

nor *Willard I* . . . suggest that plaintiff must prove that a crime was committed" in order to prove the public policy exception to Mississippi's employment at-will law. *Willard II, supra*, at 442. *Willard I* stated that "[d]ischarge in retaliation for an employee's good faith effort to protect the employer from wrongdoing constitutes an independent tort and may support punitive damages." *Willard I, supra*, at 543.

The question squarely presented in this case is whether, in applying the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), a federal court is required to accept dictum from a state's highest court in determining that state's law. If there is no statement from the state's highest court on state law, other than dictum, must a court follow that dictum or may it engage, as the Fifth Circuit did, in its own view of what state law should be?

The Fourth, Ninth and Tenth Circuits all hold that in the absence of any on-point holding from a state's highest court, the federal court is bound to follow the state court's dictum. See *Sherby v. Weather Bros. Transfer Co.*, 421 F.2d 1243, 1244 (4th Cir. 1970) ("dictum which is a clear exposition of the law must be followed unless in conflict with other decisions of that court"); *Homedics, Inc. v. Valley Forge Insurance Co.*, 315 F.3d 1135 (9th Cir. 2003) ("in diversity cases, we are generally bound by the dicta of state courts"); *Curtis Publ. Co. v. Cassel*, 302 F.2d 132, 135 (10th Cir. 1962) ("Unless it conflicts with other decisions of the Kansas Supreme Court, [dictum] must be followed").

Other circuits, while considering dictum, refuse to give it controlling effect. See *Clarke v. Kentucky Fried Chicken of California, Inc.*, 57 F.3d 21, 25 (1st Cir. 1995) ("absent a definitive (state supreme court) ruling, we may

look to 'analogous decisions, *considered dicta*, scholarly works, and any other reliable data tending convincingly to show how the [state supreme court] would decide the issue'") (emphasis in original); *Nolan v. Transocean Airlines*, 290 F.2d 904 (2nd Cir. 1961) (state dicta not binding on federal court); *Garden City Osteopathic Hospital v. HBE Corporation*, 55 F.3d 1126, 1130 (6th Cir. 1995) ("If, however, the state's highest court has not decided the applicable law, then the federal court must ascertain the state law from 'all relevant data' . . . [including] the state's supreme court *dicta*, restatements of law, law review commentaries, and the majority rule among other states") (emphasis in original); *S.D.L. By and Through T.B. v. Evans*, 80 F.3d 307, 310 (8th Cir. 1996) (state supreme court dicta is persuasive authority for federal court).

The circuits, which follow dictum from a state supreme court, are correct. What a state supreme court means is most accurately determined from what it says. The Mississippi Supreme Court has said that its public policy exception "does not require proof a crime was committed." *Willard II*, *supra*, at 443. The Fifth Circuit, under *Erie*, *supra*, has no authority to refuse to follow what the Mississippi Supreme Court has said is the law in the State of Mississippi.

CONCLUSION

This case presents this Court with an opportunity to decide two important issues that regularly confront the lower federal courts. First, is there only one particular, ritualized way to determine whether the evidence is sufficient to allow a jury to consider whether employment

discrimination has occurred? Or, on the other hand, should a jury be allowed to determine a discrimination case whenever the circumstances are such that a reasonable person could infer discrimination? On this important issue, there is a division in the circuits.

Second, how does a federal court go about determining what the law of the state is? Is a federal court of appeals free to simply look to its own precedents and adopt what it considers to be a sound decision when there is no controlling state case? Or, on the other hand, must a district court follow what the state court has said, even in dictum, is the law of a state? On this issue also, the circuits are divided.

Because of a division of the circuits on two important issues, certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners

No. _____

In The
Supreme Court of the United States

BAYLESS "BO" ODELL WHEELER
AND DANIEL L. MOORE,

Petitioners,

versus

B.L. DEVELOPMENT CORP.,
doing business as Grand Casino, Tunica,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

APPENDIX

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 04-60155

BAYLESS ("BO") ODELL WHEELER
and DANIEL L. MOORE,

Plaintiffs-Appellants,

VERSUS

BL DEVELOPMENT CORPORATION,
D/B/A/ GRAND CASINO, TUNICA,

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Mississippi

(Filed June 29, 2005)

Before DAVIS, SMITH and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:

Appellants Bayless "Bo" Wheeler and Daniel L. Moore (collectively, "Appellants") filed suit against BL Development Corporation, d/b/a Grand Casino Tunica ("Grand Casino"), asserting that they were wrongfully terminated from their employment for having reported potentially illegal activity on the part of Grand Casino or, alternatively, on account of their race in contravention of 42 U.S.C. § 1981. Grand Casino moved for summary judgment, which

was granted by the district court. Appellants timely filed the instant appeal.

BACKGROUND AND PROCEDURAL HISTORY

Moore first began his employment with Grand Casino in June 2000, when he was hired as Director of Transportation. Wheeler was hired soon thereafter as a transportation manager in August 2000. In late September 2001, Jimmy Buckhalter of Grand Casino's regulatory affairs department received information from an employee in the transportation department that a "tire changing" machine, *i.e.*, a machine used to replace tires on metal wheel rims, had been "loaned" to Country Ford, a Ford dealership in Southaven, Mississippi, located approximately 20 miles northwest of Grand Casino. Buckhalter thereafter notified Karen Sock, Grand Casino's General Manager, of the information and requested that he be permitted to conduct an investigation into the matter. Buckhalter received authorization to proceed and his investigation began shortly thereafter in October 2001.

Buckhalter soon learned that Moore's son, Terry Moore, worked at Country Ford as a warranty agent and second in charge of the auto shop. Buckhalter inquired of Wheeler, as a transportation manager, how the tire changing machine made its way into the hands of Country Ford. Wheeler allegedly provided differing accounts of how the equipment was loaned to Country Ford.[1] Buckhalter

[1] Wheeler first admitted loaning the tire changing machine to Country Ford without authorization and without filling out any paperwork memorializing the loan. He subsequently stated that the equipment was broken and that he had reached an arrangement with Country Ford whereby Wheeler would loan the machine to Country

(Continued on following page)

subsequently obtained the assistance of Daniel Moore, the Director of Transportation, to reconcile Wheeler's varying accounts and to contact his son Terry at Country Ford to uncover whether Terry had any additional information regarding the unauthorized loan. After several meetings between Buckhalter's investigative team and Appellants, it was determined that both Moore and Wheeler were to be suspended. Seven days later, Sock decided to terminate each of Moore's and Wheeler's employment with Grand Casino for "violation of company policy."

Meanwhile, at about the same time in October 2001, Grand Casino announced a new Executive Dry Cleaning Plan (the "Plan"), which offered Grand Casino executives up to $120 per month of free dry cleaning services.[2] Believing the arrangement between the dry cleaner and Grand Casino to be an illegal kickback, Appellants allegedly reported the Plan to Buckhalter prior to his investigation into the loaning of the tire changing machine. Appellants readily admit that after initially being suspended by Grand Casino, but before they were terminated, they also sent a memo to the Mississippi Gaming Commission detailing how they perceived the Plan to constitute illegal activity. The Gaming Commission conducted an investigation and

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Ford if they could, in return, fix it. It was discovered, however, that Wheeler could not identify what part of the machine was broken nor did the Country Ford representative with whom Wheeler allegedly made the arrangement have any knowledge of needing to repair the machine. In fact, the Country Ford representative revealed that the dealership did not have the capability to fix a tire changing machine.

[2] The arrangement between the dry cleaner and Grand Casino was subsequently amended to offer executives 50% off all dry cleaning instead of the $120 in free monthly services.

ultimately concluded that the Plan was not criminally illegal.

Upon being terminated, Appellants filed suit against Grand Casino, alleging that their termination was the result of their reporting to Buckhalter their belief that the Plan was illegal, and therefore was in violation of a public policy-based exception to Mississippi's employment at will doctrine. Alternatively, Appellants maintained that their termination by black casino executives occurred because Appellants are white, in violation of 42 U.S.C. § 1981. Grand Casino moved for summary judgment, arguing that there existed no genuine issue of fact under which Appellants could recover for either claim.

The district court granted Grand Casino's motion, concluding that the relevant exception to the employment at will doctrine provides Appellants protection from subsequent termination only if the activity reported was "criminal," not merely illegal. Having found that the reported activity was neither criminal nor illegal, the district court concluded that Appellants were precluded from recovering under that claim. In addition, the district court found that Appellants had not come forward with evidence establishing a prima facie case of racial discrimination, most notably proof that Grand Casino replaced Appellants with employees outside Appellants' protected class. Appellants timely filed the instant appeal.

STANDARD OF REVIEW

This Court reviews grants of summary judgment *de novo*, applying the same standard as the district court. *Tango Transp. v. Healthcare Fin. Servs. LLC*, 322 F.3d 888, 890 (5th Cir. 2003). Summary judgment is appropriate if

no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). The Court views the evidence in the light most favorable to the non-movant. *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir. 1997). The non-movant must go beyond the pleadings and come forward with specific facts indicating a genuine issue for trial to avoid summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the non-movant "fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex*, 477 U.S. at 322.

DISCUSSION

On appeal, Appellants maintain the district court erred on two grounds when it granted summary judgment in favor of Grand Casino. First, Appellants argue the district court misapplied Mississippi law in denying them relief for reporting what they believed to be illegal activity. Second, Appellants contend the district court erroneously concluded that they did not provide sufficient evidence establishing a prima facie case of racial discrimination.

In response, Grand Casino argues the district court correctly determined that the activity reported by Appellants did not actually constitute a crime and therefore summary judgment was appropriate under Mississippi law. Moreover Grand Casino maintains the only competent evidence of racial discrimination offered by Appellants

is irrelevant because the black employee allegedly subjected to disparate treatment was not a "similarly situated" employee under "nearly identical" circumstances.

I. Whether the exception to Mississippi's employment at will doctrine requires the conduct reported to actually be criminal in nature.

Mississippi has adhered to the employment at will doctrine since 1858. *Perry v. Sears, Roebuck & Co.*, 508 So. 2d 1086, 1088 (Miss. 1987). Under this common law rule, the employment contract between employer and employee may be terminated by either party with or without justification. *HeartSouth, PLLC v. Boyd*, 865 So. 2d 1095, 1108 (Miss. 2003) (citation omitted). In *McArn v. Allied Bruce-Terminix Co., Inc.*, 626 So. 2d 603 (Miss. 1993), the Mississippi Supreme Court carved out a public policy exception to this general rule. In *McArn*, the employee worked for a pest control service company. *Id.* at 604. McArn was ultimately terminated and claimed that he was wrongfully discharged because he had reported to customers and a state agency that the work being performed by his former employer was inadequate or, in some cases, non-existent. *Id.* at 605-06. In seeking to have the Mississippi Supreme Court create a narrow public policy exception to the common law rule, McArn asserted that he was simply reporting conduct that was criminal under Mississippi law. *Id.* at 606 (citing MISS.CODE ANN. §§ 97-19-39 and 69-23-19 (1972) (denoting as a felony the receipt of money under false pretense and as a misdemeanor the violation of state pest control regulations)). The Mississippi Supreme Court agreed with McArn, concluding that "an employee who is discharged for reporting illegal acts of his employer to the employer or anyone else is not barred

by the employment at will doctrine from bringing action in tort for damages against his employer." *Id.* at 607 (determining that the exception applies even where there is a "'privately made law' governing the employment relationship").

Appellants maintain that although the activity they reported involving the Plan was ultimately neither illegal nor criminal, *McArn* simply requires that they reasonably believed the activity to be criminally illegal. Appellants rely on the Mississippi Supreme Court's decision in *Willard v. Paracelsus Health Care Corp.*, 681 So.2d 539 (Miss. 1996) ("*Willard I*"), in support of their position. In *Willard I*, two hospital workers were terminated after reporting to their superiors that the hospital administrator was receiving checks personally made out to her in alleged violation of hospital policy. *Id.* at 540. After a jury trial, judgment was entered upon jury verdicts in favor of the former hospital employees. *Id.* The employees appealed, however, arguing that they were entitled to a jury instruction on retaliatory discharge and, if found by the jury, consideration of an award for punitive damages. *Id.* at 540-41. The Mississippi Supreme Court ruled the trial court erred by not giving such an instruction and remanded the case to consider whether the hospital committed the independent tort of retaliatory discharge and, if so, to consider whether punitive damages were recoverable. *Id.* at 543.

Appellants specifically rely on the court's statement that "[d]ischarge in retaliation for an employee's *good faith effort* to protect the employer from wrongdoing constitutes an independent tort and may support punitive damages." *Id.* (emphasis added). Appellants argue this statement can be interpreted as not requiring a plaintiff to prove that the

alleged illegal act reported is actually illegal, only that he had a good faith belief of the same.

Appellants' argument is unpersuasive. As an initial matter, the issue in *Willard I* was not whether the reported activity was reasonably believed to be illegal. Rather, the activity at issue in *Willard I* involved a cut-and-dried case of forgery. The court did not engage in any discussion of whether the conduct reported was criminally illegal.[3] Therefore, Appellants' attempt to equate an employee's "good faith *effort*" in reporting illegal activity, which is protected under the common law exception, with a good faith *belief* that illegal activity is taking place is misplaced.

Appellants further rely on a subsequent Mississippi Supreme Court ruling, *Paracelsus Health Care Corp. v. Willard*, 754 So.2d 437 (Miss. 2000) ("*Willard II*"), in which the court again addressed the scope of its previous decision in *McArn*. Appellants specifically cite the court's statement that "neither *McArn* or *Willard I* . . . suggest that the plaintiff must first prove that a crime was committed" for the proposition that a plaintiff merely needs to have a good faith belief that the reported conduct is illegal to benefit from the public policy exception. *Id.* at 443.

Again, Appellants' argument is unpersuasive. In *Drake v. Advance Construction Service, Inc.*, 117 F.3d 203 (5th Cir. 1997), this Court explored the boundaries of

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[3] In fact, by its own terms, the only issue the Mississippi Supreme Court was addressing was whether an employee's reporting of illegal activity is an independent tort giving rise to punitive damages – a question expressly left unanswered in *McArn*. *Willard I*, 681 So.2d at 543; *see also McArn*, 626 So.2d at 608.

McArn's public policy exception. The employee in *Drake* was retained as a quality control manager of a construction site. *Id.* at 203. After reporting to his superiors certain deficiencies in the way the job was being completed, he was ordered not to include such deficiencies in his formal reports to the Army Corps of Engineers (the "Corps"). *Id.* at 204. The employee decided otherwise and included the observed deficiencies in the quality control reports he submitted to the Corps. *Id.* at 203-04. After being terminated shortly thereafter, the employee filed suit against his employer, alleging that he was wrongfully discharged under the *McArn* public policy exception for refusing to commit an illegal act. *Id.* at 204. The district court granted summary judgment in favor of the employer, finding that the "[d]eliberate failure to note a deficiency in the placement of [rock], while perhaps unprofessional or immoral, is not an illegal act." *Id.* On appeal, this Court discussed whether the submitting of those particular false reports was violative of 18 U.S.C. § 1001. Concluding that a genuine issue of material fact existed as to whether such reporting would have constituted an illegal activity, this Court reversed and remanded the case to the district court. *Id.* at 205-06.

Importantly, the *Drake* Court did not conclude that the employee was protected under *McArn* simply because he reasonably believed what he was asked to do by his superiors was criminal. Instead, remand was ordered to determine the legality of such action, lending credence to Grand Casino's position that the act itself must be criminal to implicate the exception and rendering the subjective intent or belief of the plaintiff irrelevant. Clearly, as the parties concede in the instant case, the Plan did not constitute any form of criminally illegal activity; therefore,

McArn's "narrow public policy exception" is not applicable in this instance. To assist Appellants in broadening the scope of what the Mississippi Supreme Court and this Court have continually recognized as a "narrow public policy exception," *see Drake,* 117 F.3d at 204; *Boyd,* 865 So.2d at 1108, would serve to envelope a much wider class of activities – a broadening that is at odds with the intent of the Mississippi Supreme Court when it first created the exception.[4]

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[4] This Court has also considered whether the violation of a federal regulation (OSHA) was tantamount to criminally illegal activity under the state criminal code, and thus subject to the *McArn* exception. *Howell v. Operations Mgmt. Int'l, Inc.*, No. 03-60238, 2003 WL 22303057 (5th Cir. Oct. 8, 2003) (unpublished opinion). Specifically, the *Howell* court ruled:

> Although Mississippi law generally permits employers to terminate their at-will employees for any reason, the Mississippi Supreme Court created a "narrow public policy exception" to that rule in *McArn v. Allied Bruce-Terminix Co. Inc.*, 626 So.2d 603, 607 (1993). The exception creates a tort action in favor of an at-will employee who is discharged for "refus[ing] to participate in an illegal act" or for "reporting ***illegal acts*** of his employer." *Id. McArn* itself involved a ***criminal act***, and the Mississippi Supreme Court's statement of the issue on appeal was phrased in terms of "participat[ion] in ***criminal activity***." *Id.* at 604, 606. Howell did not assert before the district court that his OSHA complaints, had they found been found meritorious, would have amounted to reports of ***criminal acts***. Howell has not shown us, and we have not found, any Mississippi cases indicating that the *McArn* exception applies to regulatory violations of the sort involved in Howell's OSHA complaints. Our own court's prior cases involving the *McArn* exception have involved ***criminal illegality***.

Id. at *3 (emphases added and footnotes omitted). Again, this Court focused on the criminal illegality of the act itself, without regard to what the plaintiff reasonably believed to be illegal.

In sum, the district court did not err when it determined that Appellants are precluded from recovering under the public policy exception because they have failed to come forth with evidence establishing that the Plan itself constituted criminal activity.

II. Whether there was sufficient evidence supporting Appellants' race discrimination claims.

In its Memorandum Opinion, the district court found that Appellants' summary judgment evidence failed to establish a prima facie case of racial discrimination. On appeal, Appellants maintain they produced sufficient evidence of discrimination, including evidence that they were replaced by someone of a different race and that they were treated less favorably than a similarly situated person of a different race.

Under the burden-shifting framework established in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), the plaintiff may establish a prima facie case of discrimination using circumstantial evidence. *Laxton v. Gap Inc.,* 333 F.3d 572, 578 (5th Cir. 2003). To establish a prima facie case of discrimination under § 1981, Appellants must establish that they: (1) are members of a protected group; (2) were qualified for the position held; (3) were discharged from the position; and (4) were replaced by persons outside of the protected group. *Singh v. Shoney's, Inc.,* 64 F.3d 217, 219 (5th Cir. 1995). The burden then shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the termination. *Laxton,* 333 F.3d at 578. If the employer is successful in producing such a reason, the presumption of discrimination dissipates, leaving the plaintiff with the ultimate burden of establishing, by a preponderance of the

evidence, that the employer discriminated against the employee because of the employee's protected status. *Id.*

The district court concluded that summary judgment was proper as to Appellants' § 1981 claims because Appellants were unable to satisfy the fourth element of the four-prong test, *i.e.*, that they were replaced by a person outside the protected group.[6] This Court has recognized that a plaintiff may make this showing by demonstrating either that he was replaced by someone outside the protected class or that other similarly situated employees outside the protected class were treated more favorably. *Okoye v. Univ. of Tex. Houston Health Sci. Ctr.*, 245 F.3d 507, 512-13 (5th Cir. 2001).

Appellants maintain they established the fourth prong by presenting evidence that Richard Simms, a black male and the former Vice President of Resorts, assumed their duties. In addition, as evidence that they were treated differently than other similarly situated employees, Appellants argue Grand Casino did not take disciplinary action against Debra Byrd, a black female manager, who was found to have hidden Grand Casino property from auditors.

With regard to Appellants' first contention, the district court found that shortly after Appellants were terminated,

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[6] The district court also found that, even assuming Appellants did come forth with evidence establishing a prima facie case of discrimination, they nevertheless failed to rebut Grand Casino's legitimate and non-discriminatory reason for discharging them. Clearly, under *McDonnell Douglas*, we need not reach this second issue if we conclude Appellants did not first establish a prima facie case of discrimination. *See Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 427 (5th Cir. 2000).

Grand Casino engaged in a departmental restructuring. As a result of this restructuring, Simms assumed the position of Vice President of Security – a position neither Moore nor Wheeler previously held. Moreover, there is record- evidence establishing that Appellants' previous positions were formally assumed by white males after the restructuring. Specifically, Moore's position as "Director of Transportation" was filled by Chris Tatum as the "Director of Resort Operations," and Leroy Harrison assumed the position of "Transportation Manager," the position formerly held by Wheeler. Both Tatum and Harrison are white. Based on these facts, the district court properly concluded that Appellants were not replaced with persons outside the protected class.

As for Appellants' second argument regarding dissimilar treatment for similarly situated employees, the district court determined that Byrd, a black Grand Casino manager, was ultimately not terminated because she was truthful in her statements during the course of the investigation into her actions. Conversely, the district court found it relevant that Wheeler was discharged for making repeated, untruthful statements during the company's investigation into his unauthorized loaning out of equipment.

To establish disparate treatment, a plaintiff must demonstrate that a "similarly situated" employee under "nearly identical" circumstances, was treated differently. *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1090 (5th Cir. 1995). Appellants argue that Wheeler, Moore, and Byrd all had the same supervisor; Moore and Byrd were both directors; and all three were accused of removing company assets at relatively the same time. Appellants offer as further proof of their employment discrimination

claim the fact that the decision makers responsible for terminating Appellants are all black (Karen Sock, Richard Simms, and Jimmy Buckhalter).

In response, Grand Casino notes that Byrd was found to have hidden two boxes of shampoo and hair coloring in her car, the value of which is "dramatically less" than that of a several thousand dollar tire changing machine.[6] Moreover, Grand Casino observes that Byrd readily admitted her conduct during the investigation, whereas Appellants were found to have been less than truthful throughout the investigation into their activities. Grand Casino also argues that the record evidence reflects the fact that white males other than Appellants, who had been found to have removed company assets without permission, received disciplinary actions short of termination.

In sum, Appellants have not come forward with sufficient evidence establishing that their termination was racially motivated. Appellants have not established that they were replaced by non-white employees nor have they demonstrated that their discharge was the result of being treated any differently than other non-white similarly situated employees.

CONCLUSION

Having carefully reviewed the entire record of this case, and having fully considered the parties' respective briefing and arguments, we conclude the district court

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[6] Grand Casino maintains the difference in the value and nature of the property allegedly removed by Appellants and Byrd necessarily requires a finding that the circumstances in each case are not "nearly identical" for purposes of this panel's disparate treatment inquiry.

properly granted summary judgment in favor of Grand Casino because Appellants failed to come forward with evidence establishing: (1) the Plan adopted by Grand Casino constituted criminally illegal activity; or (2) a prima facie case of racial discrimination. Accordingly, the district court's granting of summary judgment is AFFIRMED.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

BAYLESS ("BO") ODELL WHEELER and DANIEL J. MOORE — Plaintiff

vs. — Civil Action No. 3:02cv133

BL DEVELOPMENT CORPORATION, d/b/a GRAND CASINO TUNICA — Defendants

MEMORANDUM OPINION AND ORDER

(Filed Feb. 02, 2003)

This cause comes before the court on the motion of defendant BL Development Corporation, d/b/a Grand Casino Tunica ("Grand Casino") for summary judgment [80-1], pursuant to Fed. R. Civ. P. 56. Plaintiffs Bayless "Bo" Wheeler and Daniel Moore have responded in opposition to the motion, and the court, having considered the memoranda and submissions of the parties, concludes that the motion is well taken and should be granted.

Plaintiffs filed this action against their former employer Grand Casino, seeking recovery for their allegedly wrongful termination from the casino's transportation department. In their complaint, plaintiffs allege that they were fired for reporting what they believed to be illegal activity in the casino relating to an "executive dry cleaning plan" offered to casino executives. Under the plan, Kings Cleaners would provide executives at the Grand Casino with up to $120 a month in free dry cleaning as a part of a dry cleaning contract between the cleaner and the casino. Based upon their belief that the plan constituted an illegal

"kickback" to casino executives, plaintiffs reported the plan to the casino's compliance officer, and, subsequently, to the Mississippi Gaming Commission and the Mississippi Attorney General.

Plaintiffs allege that casino executives, angered by the reports filed against them, began searching for a pretext to terminate plaintiff's employment. Plaintiffs allege that the executives found such a pretext in the form of an incident in which plaintiffs loaned out the casino's tire changer to an area business. The casino investigated the incident, and eased upon the alleged misappropriation of casino property and also based upon Wheeler's allegedly untruthful statements regarding same, terminated plaintiffs' employment. On August 28, 2002, plaintiffs filed this action, alleging that they were terminated for having reported potentially illegal activity, or, alternatively, that they were fared based upon their race, in violation of 42 U.S.C. § 1981. Grand Casino has moved for summary judgment, arguing that no genuine issue of fact exists regarding plaintiffs' ability to recover under either claim.

The court considers first plaintiffs' argument that they were terminated for having reported what they believed to be illegal activity, in violation of a public policy-based exception to the employment at-will doctrine. Mississippi law generally permits employers to terminate their at-will employees for any reason, but the Mississippi Supreme Court created a "narrow public policy exception" to that rule in *McArn v. Allied Bruce-Terminix Co. Inc.*, 626 So.2d 603, 607 (1993). *McArn* created a tort action in favor of an at-will employee who is discharged for "refus[ing] to participate in an illegal act" or for "reporting illegal acts of his employer." *Id.*

In the court's view, plaintiffs' action fails to meet the requirements for recovery under *McArn*, as the decision has been interpreted by the Fifth Circuit Court of Appeals. In *Howell v. Operations Management Intern, Inc.*, 2003 WL 22303057 (5th Cir. Oct. 23, 2003), the Fifth Circuit recently concluded that the *McArn* cause of action only applies to terminations resulting from the reporting of "criminal," rather than merely illegal, activity.

In *Howell*, the Fifth Circuit affirmed Judge Davidson's dismissal of a lawsuit filed by an employee who had allegedly been fired for reporting violations of OSHA workplace safety regulations. *Howell*, slip op. at 2. The Fifth Circuit agreed with Judge Davidson that the *McArn* cause of action was a limited one which solely addresses terminations resulting from the reporting of criminal activity. *Id.* Specifically, the Fifth Circuit in *Howell* wrote as follows:

> Although Mississippi law generally permits employers to terminate their at-will employees for any reason, the Mississippi Supreme Court created a "narrow public policy exception" to that rule in *McArn v. Allied Bruce-Terminix Co. Inc.*, 626 So.2d 603, 607 (1993). The exception creates a tort action in favor of an at-will employee who is discharged for "refus[ing] to participate in an illegal act" or for "reporting illegal acts of his employer." *Id. McArn* itself involved a criminal act, and the Mississippi Supreme Court's statement of the issue on appeal was phrased in terms of "paticipat[ion] in criminal activity." *Id.* at 606. . . . Howell has not shown us, and we have not found, any Mississippi cases indicating that the *McArn* exception applies to regulatory violations of the sort involved in Howell's OSHA complaints. Our own court's prior cases involving the

> *McArn* exception have involved criminal illegality.

Howell, slip op. at 4 (some citations omitted). The Fifth Circuit further wrote in *Howell* that "[s]ince almost every aspect of the workplace is governed by regulations of some sort, expanding the *McArn* exception to encompass the alleged violations urged by Howell would work a significant change in Mississippi labor law." The court therefore refused to extend the cause of action to non-criminal activity. *Id.*

As an unpublished opinion, *Howell* does not constitute binding authority on this court, but it may properly be considered as persuasive authority, See Fifth Circuit Rule 47.5.4, and the court finds the Fifth Circuit's rationale in *Howell* to be persuasive. While *McArn* does promote important public policy considerations, it is important to balance those policy considerations against those supporting Mississippi's traditional employment at will doctrine. The employment-at-will doctrine is a long-established aspect of Mississippi employment law, and it would be unwise to recognize an exception to that doctrine in every case in which an employee is alleged to have been fired for reporting any violation of a myriad of federal or state regulations. By limiting the *McArn* cause of action to cases involving criminal activity, the law effectively balances the competing interests of the public and of employers in this context.

In this case, plaintiffs are not even able to establish that the executive dry cleaning plan violated gaming laws and/or regulations, much less any criminal laws. At most, plaintiffs contend that they *believed* that the dry cleaning plan violated applicable laws, but, in the court's view, such

is plainly insufficient to support recovery under *McArn*. Indeed, plaintiffs have failed to present any applicable regulations and/or laws which might lead this court to conclude that plaintiffs reasonably believed that the dry cleaning "perk" offered to casino executives was illegal. Plaintiffs have failed to establish that they were fired for reporting illegal, much less criminal, activity, and their *McArn* claims are therefore due to be dismissed.

The court now turns to plaintiffs' argument that they were terminated by African-American executives at the casino because they were white, in violation of 42 U.S.C. § 1981. Plaintiffs offer no direct proof of discrimination in this case, instead seeking to grove their case circumstantially based on the standard set forth by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Under the *McDonnell Douglas* standard, plaintiffs must prove a *prima facie* case of race discrimination by establishing that they were (1) members of a protected group; (2) qualified for the position they held; (3) discharged from the position; and (4) either replaced by someone outside the protected group or treated less favorably than employees not in the protected group. *See Pratt v. City of Houston*, 247 F.3d 601, 606 (5th Cir. 2001); *Daigle v. Liberty Life Ins. Co.*, 70 F.3d 394, 396 (5th Cir. 1995).

If plaintiffs are successful in establishing a *prima facie* case of discrimination, then the burden shifts to the defendant to produce a legitimate, nondiscriminatory justification for its actions. *Burdine*, 450 U.S. at 254. If the defendant can articulate a reason that, if believed, would support a finding that the action was nondiscriminatory, then the inference of discrimination created by the plaintiffs' *prima facie* case disappears and the factfinder must

decide the ultimate question of whether the plaintiff has proven intentional discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511-12,113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993).

In this case, plaintiffs are unable to even establish their *prima facie* case of discrimination. In particular, plaintiffs' proof is lacking regarding the fourth element of their *prima facie* case, which requires proof that plaintiffs were terminated based on their status as a member of a protected class. As noted previously, such a showing may be based on proof that plaintiffs were replaced by employees outside the protected class, or, alternatively, that employees outside the protected class were treated differently. *Daigle*, 70 F.3d at 396. In this case, however, defendants have submitted proof that plaintiffs were replaced by other white employees.

Plaintiffs submit that Moore was replaced by Richard Simms, an African-American, but defendants have submitted evidence that the departments at the casino were restructured and that Simms is the vice president with responsibilities similar to former Vice President of Security Hank Thomas. Plaintiffs argue that Debra Byrd, a black employee, was found to have misappropriated casino property and was not fired, but the casino rebuts that Wheeler was fired for having made repeated untruthful statements in the course of the investigation and that Byrd made no similar untruthful statements. Moreover, as discussed *infra*, plaintiffs' primary argument is that they were terminated based on having reported the executive dry cleaning perk to state officials, and plaintiffs do not allege that Byrd engaged in such conduct yet was not fired. Therefore, plaintiffs have failed to demonstrate

either that they were replaced by black employees or that black employees were treated differently than they were.

Moreover, even assuming, *arguendo*, that plaintiffs were able to establish a *prima facie* case of discrimination, the court would nevertheless conclude that they had failed to demonstrate that the casino's stated non-discriminatory reason for terminating them (i.e. the tire changer incident) was a pretext for discrimination. In order to establish pretext, the Fifth Circuit has noted that a plaintiff "must prove . . . that the employer's reasons were not the true reason for the employment decision and that unlawful discrimination was." *Bodenheimer v. PPG Industries, Inc.*, 5 E.3d 955, 957 (5th Cir. 1993) (*citing St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 2747, 125 L. Ed. 2d 407 (1993)). In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 134, 120 S. Ct. 2097, 2101, 147 L. Ed. 2d 105 (2000); the United States Supreme Court stated that it is ordinarily sufficient for a plaintiff to demonstrate that an employer's stated reason was false, in order to permit a jury to find that discrimination was the true reason for the plaintiffs' termination. The Supreme Court noted in *Reeves*, however, that:

> [s]uch a showing by the plaintiff will not always be adequate to sustain a jury's liability finding. Certainly there will be instances where, although the plaintiff has established a *prima facie* case and introduced sufficient evidence to reject the employer's explanation, no rational factfinder could conclude that discrimination had occurred.

Reeves, 530 U.S. at 134, 120 S. Ct. at 2101.

In the court's view, even if it were to assume that plaintiffs could prove their *prima facie* case and even if it

were to assume further that the tire-changer incident was not the casino's real reason for terminating plaintiffs, no rational factfinder could conclude that either plaintiff was fired in this case because of his race. Indeed, plaintif's attempts to demonstrate that they were terminated based on their race is greatly hampered by their own central theory of this case: that they were terminated based on their having reported potentially illegal activity to state officials. Plaintiffs have arguably come forward with circumstantial proof that their termination was based upon their having reported what they (unreasonably) believed to be illegal activity, but they have produced no evidence, direct or circumstantial, which might lead the court to conclude that they were terminated based on their race. The Fifth Circuit has noted that, the Supreme Court's admonition in *Reeves* notwithstanding, "discrimination suits still require evidence of discrimination," *see Rubinstein v. Administrators of the Tulane Educ. Fund*, 218 F.3d 392, 400 (5th Cir. 2000), and plaintiffs have produced no evidence of discrimination in this case. Plaintiffs' race discrimination claims are therefore due to be dismissed.

In light of the foregoing, the court concludes that plaintiffs' *McArn* claims are barred due to the fact that they were not fired for reporting criminal, or even illegal, activity in this case. Plaintiffs' racial discrimination claims lack merit due to plaintiffs' failure to produce any evidence, circumstantial or direct, that they were terminated on the basis of their race. Both claims will therefore be dismissed.

It is therefore ORDERED that defendant's motion for summary judgment is granted. A separate judgment will be issued this date, in accordance with Fed. R. Civ. P. 58.

SO ORDERED, this the 30th day of January, 2004.

/s/ Michael P. Mills
MICHAEL P. MILLS
UNITED STATED
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

BAYLESS ("BO") ODELL WHEELER and DANIEL J. MOORE — **Plaintiff**

vs. — **Civil Action No. 3:02cv133**

BL DEVELOPMENT CORPORATION, d/b/a GRAND CASINO TUNICA — **Defendants**

JUDGMENT

(Filed Feb. 2, 2003)

For the reasons given in the court's memorandum opinion and order issued this date, it is hereby ORDERED and ADJUDGED that this cause is dismissed.

SO ORDERED, this the 30th day of January, 2004.

/s/ Michael P. Mills
MICHAEL P. MILLS
UNITED STATES DISTRICT JUDGE